GOH CHOO KUI & 2 ORS.

v.

STAR COACH BUILDERS SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J
[CASE NO. 12-53-1992]
18 FEBRUARY 1995

LANDLORD & TENANT: *Appellants joint owners of factory - Tenancy agreement entered into between respondent as tenant and third appellant as landlord - Third appellant passing away - Respondent continuing to issue cheques in name of deceased - Warrant of distress taken out against respondent in name of joint owners - Wheher the first and second appellants had the locus standi to institute the action - Whether surviving joint owners can be deemed "landlord" under s. 2 Distress Act 1951.*

WORDS & PHRASES: *"landlord" - Section 2 Distress Act 1951.*

This was an appeal by the appellants, joint owners of a factory (the said premises), against an order discharging a warrant of distress against the respondent.

On 17 November 1990, a tenancy agreement was executed between the third appellant as landlord and the respondent as tenant. As agreed, an agent of the landlord collected the monthly rent but when it was learned sometime in May 1991 that the landlord had paased away, the respondent was placed in a dilemma as to future payments. On legal advice, the respondent continued to issue cheques in the name of the deceased and the agent was informed accordingly. Upon failing to receive the rentals the surviving joint owners obtained a warrant of distress against the respondent which was eventually discharged by the learned Session Court Judge on the respondent's application.

At the hearing of the appeal, Counsel for the respondent contended that it was wrong for the third appellant to be a party in her own name as she had passed away prior to the distress application. He further contended that as the agreement was only made with the third appellant, the first and second appellants had no *locus standi* to apply for the warrant of distress.

The issue was whether the first and second appellants as joint owners of the said premises came within the definition of "landlord" under s. 2 of the distress Act 1951.

Held:

Under s. 2 of the Act, "landlord" means the lessor or sub-lessor of any premises, under any lease, sub-lease, or agreement of tenancy, and includes any person claiming to be entitled in any capacity to receive rents due under any such lease or agreement. However, from the tenancy agreement it would seem clear that the first and the second appellants could not be the landlords though they could be co-owners of the said premises. Neither could they claim to be "any person claiming to be entitled in any capacity to receive rents due under any such lease or agreement" for to do so, they should be within the ambit of cl. III(9) of the tenancy agreement, which reads "this agreement shall be binding upon the heirs, personal representatives, assigns and successors in title of the parties hereto". There has been no evidence shown by the first and the second appellants that they come within the ambit of the cl. III(9) of the tenancy agreement.

[Appeal dismissed with costs].

Case referred to:
J. Selvam & Anor. v. S. Mehta & Anor. [1981] 2 MLJ 45 ***(refd)***

Legislation referred to:
Distress Act 1951 (Revised - 1981), ss. 2, 5(1), (2), 6

For the petitioner - Ong Ban Chai; M/s. Ong Ban Chai & Co.
For the respondent - Khoo Kay Ping; M/s. John, Ang & Jega

JUDGMENT

Haidar bin Mohd. Noor J:

This is an appeal by the plaintiffs ('appellants') against the order of the learned Sessions Court Judge given on 19 August 1992 discharging the warrant of distress dated 5 December 1991 together with costs.

On 4 December 1991 the appellants filed an *ex parte* application in the Sessions Court for a writ of distress (should properly be 'warrant of distress') under s. 5(1) of the Distress Act 1951 (Revised - 1981) ("the Act") against the defendant ('respondent'), as tenant, for recovery of arrears of rents in the sum of RM56,000. It is supported by the affidavit of the first appellant (p. 31 of the record of appeal). The rental is in respect of the premises of factory no. 1, Lot 7449, Mukim of Tebrau, Jalan Kempas Lama, 81300 Johor Bahru ('the said premises'), where it was alleged that rental for the months of May to December 1991 at RM7,000 per month was not paid by the respondent. An *ex parte* order was accordingly granted by the Sessions Court.

On 11 December 1991 the respondent filed an application (pp. 20 to 22 of the record of appeal) to discharge the warrant of distress dated 5 December 1991 and the properties seized on 7 December 1991 under the authority of the warrant of distress be released to the respondent and costs to be borne by the appellants. It is supported by the affidavit of Michael Chng Chor Seng, the managing director of the respondent (pp. 33 to 39 of the record of appeal). An affidavit in reply was filed by the first appellant (pp. 51 - 56 of the record of appeal).

Background Facts

On 17 November 1990 a tenancy agreement was executed between Chan Siew Eng, the third appellant, as landlord, and the respondent, as tenant, in respect of the said premises at RM9,000 per month with effect from 1 December 1990 for a term of three years with time of payment to be made on the 7th day of each month (pp. 66 to 75 of the record of appeal). A deposit of RM27,000 was paid by the respondent (p. 73 of the record of appeal). It was, however, agreed that the rental would be reduced to RM7,000 per month in view of the reduced area that was let out.

It was the practice and agreement that at all time the monthly rents were collected by an agent of the landlord, one Goh Chin Khek who was believed to be the son of the landlord. Sometime in May 1991, the respondent came to know that the landlord had passed away. In view of her death, the respondent was in the dilemma as to whom to make the payments. It seemed, on legal advice, cheques were made out in favour of the deceased and the agent was informed accordingly that if payments were to be made in other name then some solicitor would have to take legal responsibility. Unfortunately, according to the respondent, this was not done by any of the next-of-kin of the deceased landlord.

Without making oral or written demand for the rents of the months of May to December 1991 or giving whatsoever notice to the respondent, the appellants applied and obtained from the Sessions Court an *ex parte* order for warrant of distress wherein a number of properties of the respondent were seized by the bailiff from the said premises on 7 December 1991. However, on the hearing of the respondent's application, the respondent's Counsel withdrew the prayer in respect of the order for release of the properties of the respondent seized by the bailiff as apparently the properties were released after the payment of RM57,000 deposited by the respondent with their solicitor as stakeholder.

It was not disputed that it was only the third appellant who executed the tenancy agreement as landlord whereas the first and the second appellants were also the joint owners of the said premises. The third appellant died when the application for warrant of distress was filed. The respondent's Counsel contended that it would therefore be wrong for the third appellant to be a party in her own name when she had already died. Mr. Ong Ban Chai, acting for the appellants applied for the striking out of the third appellant's name as a party but apparently from the record of the proceedings, no order was made by the learned Sessions Court Judge. Be that as it may, the respondent relied essentially on the *locus standi* of the appellants to file the writ of distress.

Law

In view of the death of the third appellant, who alone executed the tenancy agreement as landlord, can the first and the second appellants though they were joint owners of the said premises, be considered as 'landlord' under s. 2 of the Act?

Under s. 2 of the Act, "landlord" means the lessor or sub-lessor of any premises, under any lease, sub-lease, or agreement of tenancy, and includes any person claiming to be entitled in any capacity to receive rents due under any such lease or agreement.

The first appellant in his affidavit in support of the application for warrant of distress purportedly claimed to have acted as a landlord (see p. 31 of the record of appeal). However, from the tenancy agreement it would seem clear that the first and second appellants could not possibly be the landlords though they could be co-owners of the said premises (see *J. Selvam & Anor. v. S. Mehta & Anor.* [1981] 2 MLJ 45). Neither could the first and the second appellants claim to be "any person claiming to be entitled in any capacity to receive rents due under any such lease or agreement" under the definition of 'landlord' in the Act as, in my view, to so claim they should be within the ambit of cl. III(9) of the tenancy agreement, which reads:

> (9) This agreement shall be binding upon the heirs, personal representatives, assigns and successors in title of the parties hereto.

There has been no evidence shown by the first and the second appellants that they come within the ambit of the cl. III(9) of the tenancy agreement. Hence, neither the first nor the second appellant could come within the meaning of 'landlord' in the Act.

Further, s. 5(1) of the Act also provides for the landlord's agent to apply for an order for the issue of warrant of distress. However, s. 5(2) prescribes for such authority to be in writing and shall be produced at the time of the application. Section 5(2) also allows for a power of attorney to be accepted by the Court as such authority. However, the first and the second appellants had not shown any such authority to the Sessions Court.

It would seem clear that the first and the second appellants had not satisfied the provisions relating to "the landlord or his agent" to entitle them to make the application. In other words, they have no *locus standi* to do so.

In respect of joint owners under s. 6 of the Act, the provision, in my view, merely provides the machinery in a situation where there are more than one landlord and whose right to distrain is accrued then one of the landlords could exercise such right in his own name and the names of those jointly or together interested in him. It does not give the right to distrain to any joint owner who does not satisfy the provisions of s. 5 of the Act as in this case where the first and the second appellants were neither the landlord nor the agent. (See *J. Selvam & Anor. v. S. Mehta & Anor., supra*).

Even assuming, the first and second appellants could come within the provision of s. 6 of the Act, the present action was not taken in the names of all joint owners as firstly, Mr. Ong Ban Chai, Counsel for the appellants applied for the striking out of the third appellant as a party and secondly, if the third appellant were to be made a party, it should be under the estate of the third appellant and not under the personal name of the third appellant who had died at the time the action for the issue of warrant of distress was filed. Therefore, the application for warrant of distress in this case has not satisfied the requirements of s. 6 of the Act.

In any event I am of the opinion that this matter of the payment of the rents could be easily resolved by the heirs or personal representatives of the third appellant showing their status through the production of the letters of administration of the estate of the third appellant. The solicitor for the respondent could then release the money to them as the money was held by the respondent's solicitor as stakeholder. The question of the respondent refusing to pay the rents did not arise.

For the reasons set out by me I am of the view that there are no grounds for me to interfere with the order of the learned Sessions Court Judge and the order is accordingly affirmed and the appeal is dismissed with costs.